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In The
Supreme Court of the United States

October Term, 1982

GREITZER & LOCKS, GENE LOCKS and
MARTIN GREITZER; NEIL R. PETERSON,
Petitioners,

v.

JOHNS-MANVILLE CORPORATION and
JOHNS-MANVILLE SALES CORPORATION;
RAYBESTOS-MANHATTEN, INC.;
EAGLE-PICHER INDUSTRIES, INC.;
UNARCO INDUSTRIES, INC.;
FIBREBOARD CORPORATION;
H.K. PORTER COMPANY;
SOUTHERN TEXTILE CORPORATION;
THE CELOTEX CORPORATION;
KEENE CORPORATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Robert C. Nusbaum
Linda S. Laibstain
HOFHEIMER, NUSBAUM, McPHAUL & BRENNER
1010 Plaza One
P.O. Box 3508
Norfolk, Virginia 23514
(804) 622-3366
Attorneys for Petitioners

QUESTIONS PRESENTED

I.

Is an Order granting a Motion to Disqualify Counsel appealable as a final decision in a collateral matter pursuant to 28 U.S.C. Section 1291 under the "Collateral Order" doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949)?

II

Does a nonclient of a former United States Department of Justice trial attorney who possesses no confidences of the non-client or co-defendants and who never had any community of any litigative or other interests with the non-client have standing to contest the employment by a private law firm of that former government attorney under a motion to disqualify the private firm where the government has "waived" any imputed disqualification?

III.

Should not this Court, as an important matter of first impression, approve in principle the use of a "screening" mechanism as approved in Formal Opinion 342 of the American Bar Association so as to prevent the automatic disqualification of a law firm which has employed a former United States Department of Justice trial attorney?

IV.

As a function of its supervisory power over the lower courts, should not this court articulate standards for the imputed disqualification of eminently competent (experienced legal) counsel of choice to preclude disqualifying such counsel on appearance of impropriety grounds alone where no actual impropriety, taint or unfairness can be demonstrated, and prejudice will plainly result to the clients of the disqualified attorney.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATE COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners, Greitzer & Locks, Gene Locks, Martin Greitzer and Neil R. Peterson, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on June 17, 1982.

I. OPINIONS BELOW

The Court of Appeals for the Fourth Circuit, sitting en banc, affirmed by an equally divided court, without opinion, the judgment of the District Court. The order is not yet reported and is set forth at Appendix A herein. The majority Opinion of the three judge panel of the Court of Appeals for the Fourth Circuit, reversing the district court, is not reported and is set forth at Appendix B herein. The Opinion of the United States District Court for the Eastern District of Virginia is not reported and is set forth at Appendix C herein.

II. JURISDICTION

The Judgment of the United States Court of Appeals for the Fourth Circuit was entered June 17, 1982. This Petition is filed within ninety (90) days. The Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

III. QUESTIONS PRESENTED

1. Is an Order granting a Motion to Disqualify Counsel appealable as a final decision in a collateral matter pursuant to 28 U.S.C. Section 1291 under the "Collateral Order" doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949)?

2. Does a non-client of a former United States Department of Justice trial attorney who possesses no

confidences of the non-client or co-defendants and who never had any community of any litigation or other interests with the non-client have standing to contest the employment by a private law firm of that former government attorney under a motion to disqualify the private firm where the government has "waived" any imputed disqualification?

3. Should not this Court, as an important matter of first impression, approve in principle the use of a "screening" mechanism as approved in Formal Opinion 342 of the American Bar Association so as to prevent the automatic disqualification of a law firm which has employed a former United States Department of Justice trial attorney?

4. As a function of its supervisory power over the lower courts, should not this Court articulate standards for the imputed disqualification of eminently competent (experienced legal) counsel of choice to preclude disqualifying such counsel on appearance of impropriety grounds alone where no actual impropriety, taint or unfairness can be demonstrated, and prejudice will plainly result to the clients of the disqualified attorney.

IV. REGULATIONS INVOLVED

This case involves the Code of Professional Responsibility of the American Bar Association Canons 4, 5 and 9 and Disciplinary Rules 5-105(A), 5-105(D) and 9-101(B). See Appendix F. at A-108, A-109.

V. STATEMENT OF THE CASE

This Petition presents yet another disqualification matter to this Court, but one with significant differences, for never before has this Court been presented with a situation in which:

1. A Department of Justice formal waiver of imputed

disqualification of a law firm (expressly sanctioned under existing Ethical Codes by ABA Formal Opinion 342 and expressly approved for future use by Rule 1.11, Kutak Commission Report*) has been overridden by a court;

2. An imputed disqualification has been ordered based upon presumed and unproved confidences of a non-client;

3. A lawyer has not effectively switched sides in relation to the movant; and

4. There is no evidence, let alone concrete evidence, that there is any trial prejudice or taint, as those criteria were articulated by this Court in *Firestone* v. *Risjord*, 449 U.S. 368, 66 L. Ed. 2d 577, 101 S. Ct. 669 (1981).

The end result of this conjoining of circumstances is that 260 injured victims of asbestos disease (not corporate clients with great financial reserves as is usual in this type of case) are deprived of highly competent trial counsel of their free choice without any palpable reason therefor, all to their demonstrated prejudice.

During the summer of 1976, a number of Tidewater, Virginia asbestos workers and their families sought the services of Gene Locks, a partner and seasoned and highly competent trial lawyer in the Philadelphia law firm of Greitzer & Locks, to pursue their claims for asbestos-related injuries and deaths against several asbestos manufacturers. Mr. Locks was experienced in workmen's compensation claims and products liability litigation and came highly recommended by his Philadelphia shipyard clients. Locks, who came to represent over 260 Tidewater clients, initially associated two (2) young local attorneys to assist him, one in Norfolk and one in Newport News. Record at 68, 85, 86.** Throughout extensive discovery in the pre-trial period and during the trial of the first five cases,[1] Locks managed the

* Appendix N at A-155 et seq.

** Record (R.) refers to Appendix filed in the United States Court of Appeals for the Fourth Circuit.

[1]The first trial, *Dishner* v. *Johns-Manville*, resulted in a verdict of $795,000. The second trial, involving four plaintiffs, *Oman, et al* v. *Johns-Manville et al.*, resulted in verdicts of $435,000 for each of four plaintiffs, totaling of $1,720,000.

medical, the expert scientific and the product defect aspects of the cases, conducting nationwide discovery and becoming recognized in a number of states as one of the nation's foremost asbestos plaintiff's attorneys. Record at 77 - 86. He and his local co-counsel, whose primary function was to work up individual cases, were pitted against nearly all of the major defense firms in eastern Virginia, representing every major manufacturer.

The asbestos manufacturers had, in the meantime, sued over against the United States government as a third party defendant on a number of negligence theories.[2] The Justice Department coordinated the government's defense, its primary client agency being the United States Navy. Although the United States was named as a third party defendant in some 233 cases, it has never paid one dollar in settlement and it won the one case ever tried against it on the merits. In fact, the Court of Appeals for the Fourth Circuit, when its panel reversed the order of disqualification, had already removed the issue of the government's liability for negligence. See *Glover* v. *Johns-Manville Corp.* 662 F.2d 225 (th Cir. 1981); *White* v. *Johns-Manville Corp.* 662 F.2d 234 (4th Cir. 1981); *White* v. *Johns-Manville Corp.* 662 F.2d 243 (4th Cir. 1981). In upholding the District Court's determination that there was no negligence on the part of the government, the Fourth Circuit virtually eliminated the United States' participation in these actions. This is further illustrated by the manufacturers' voluntary dismissal of the United States as a party in 137 cases pending in Newport News in June 1982, and in the several Norfolk cases then set for trial.

[2] The plaintiffs filed actions directly against the United States in only 19 cases, and those solely for protectionary purposes under a court mandate. All direct actions against the United States in which petitioners were counsel of record were initially stayed and have been subsequently dismissed.

In October of 1980, Neil Peterson, a former Justice Department attorney who had represented the United States in Virginia asbestos litigation and who had successfully defended the United States *against* the asbestos manufacturers, was hired by Greitzer & Locks as an associate to help with the firm's growing caseload in Pennsylvania and elsewhere *outside* Virginia. It was always fully and firmly understood by the firm, Peterson and the Justice Department that Peterson would not be involved in the Virginia cases. Following its routine procedures in similar situations, the Justice Department in August, 1980, at Peterson's request, had begun initiating the procedures for a waiver of imputed disqualification to allow the other firm members (particularly Gene Locks) to remain in the Virginia litigation. Pursuant to an informal understanding among all involved parties prior to Peterson's association with the firm, the firm instituted screening measures whereby Peterson would have no access to Virginia files, would not participate in the Virginia cases or in any discussion regarding them, and would not share in any fees derived from those cases. App. C at A-45, A-46. Although the Justice Department had not issued a formal waiver, the Civil Division for which Peterson had worked, in consultation with the Office of Legal Counsel, approved the arrangement as there was clearly no reason to do otherwise.

In November of 1980, twelve (12) of the manufacturers filed a motion to disqualify Greitzer & Locks from Virginia asbestos litigation, based solely on an affidavit filed by Johns-Manville's counsel, C. Michael Montgomery. The affidavit was subsequently withdrawn at Mr. Montgomery's request. Prior to the first hearing on the motion, three of the manufacturers withdrew their support. Several manufacturers, including Owens-Corning Fiberglass, Nicolet, Amatex and Forty-Eight Insulations, never joined in the motion (the primary mover, Johns-Manville Corporation, has recently invoked Chapter 11 of the Bankruptcy Code).

In January, 1981, after receiving confirmation from all of its client agencies involved, the Justice Department

issued a formal waiver of imputed disqualification as to Greitzer & Locks, and filed it in the United States District Court at Norfolk in the pending disqualification proceedings. App. J at A-138 et seq.

During the evidentiary hearing held in February, 1981 [the Court allocated one-half (½) day], the manufacturers presented no evidence whatsoever of any attorney-client relationship between themselves and Peterson, or of any secrets or confidences held by Peterson; nor was there any evidence of a breach of the screen, nor even a suggestion, let alone a concrete showing, of any taint that would accrue to the future trial proceedings. At best, the manufacturers offered irrelevant trivia which a majority of the Court of Appeals panel found to be unworthy of consideration, but which found favor with District Judges who were plainly affronted that the employment of Peterson was not sooner discussed with them. (See App. C at 96.) Thus, the District Court issued an order on April 6, 1981, disqualifying Greitzer & Locks from *all* Virginia asbestos cases, including those in which the United States was *not* a party. Subsequent to the filing of a notice of appeal, the District Court amended its order, limiting the disqualification to those cases in which the United States was a party, but admonishing local co-counsel for the plaintiffs of the hazards of continuing their association with the firm in the remaining cases.

Following extensive briefing and oral argument, on March 5, 1982, the District Court's disqualification of Greitzer & Locks was reversed as to actions against the manufacturers and vacated as to those 19 actions directly against the United States[3] by the majority of a three Judge Panel of the Court of Appeals for the Fourth Circuit.[4]

[3]These actions had been dismissed while the case was on appeal.

[4]By this time, a state court in Illinois had also denied a manufacturer motion objecting to the admission of Gene Locks pro hac vice. The motion had been brought by three(3) of the same manufacturers on identical grounds.at App. G at A-110 et seq.

All asbestos actions pending in the Eastern District of Virginia had been stayed from December, 1979, pending the determination of various issues affecting that litigation by the Fourth Circuit. Retrial of the *Oman* case (tried by Gene Locks and co-counsel in November and December, *1979*, and resulting in a $1,720,000 jury verdict set aside by the trial judge and reversed and remanded by the Fourth Circuit, cert. denied) had been set for April 13, 1982, with other cases scheduled thereafter.

Only five (5) of the original moving manufacturers filed a Petition for Rehearing and Suggestion for Rehearing en Banc, which was granted on April 23, 1982. Appellants and all four plaintiffs in the *Oman* case applied to the Appeals Court for a stay of the trial proceedings until June 14, 1982. The manufacturers filed no objection and the stay was immediately granted by the Fourth Circuit, effectively halting all asbestos trial proceedings in the Eastern District of Virginia.

Oral argument was held before the Fourth Circuit Court of Appeals, sitting en banc on June 6, 1982. The Court, unable to reach a majority, issued an order on June 17, 1982, affirming the District Court's disqualification order by an *evenly divided* Court, with no opinion.

With the *Oman* case set for July 23, 1982, Appellants applied to the Fourth Circuit for a Stay of the Mandate and a Stay of the Trial Proceedings. Only one (1) defendant objected to a stay of the litigation. Three (3) weeks after the applications were filed, on the Friday preceding the scheduled trial date, Appellants' Applications for Stays were denied, again by an evenly divided Court.

On retrial of the *Oman* case during July and August, 1982, conducted by local counsel without Gene Locks, the

jury returned four verdicts aggregating $829,000.00, barely more than half of the verdicts returned two and one-half (2½) years previously with far less liberal evidentiary rulings and when the plaintiffs' diseases had not progressed as much as at retrial. As we note below, the oft criticized tactic of a disqualification motion succeeded admirably here, with devastating trial prejudice to the innocent plaintiffs, to the delight of manufacturers and the embarrassment of the judicial system.

VI. REASONS FOR GRANTING THE WRIT

I.

AN ORDER GRANTING A MOTION TO DISQUALIFY COUNSEL IS APPEALABLE AS A FINAL DECISION IN A COLLATERAL MATTER UNDER THE COHEN DOCTRINE.

A. *Effect of Firestone on Appealability of Orders Granting Disqualification*

Prior to *Firestone* v. *Risjord*, 449 U.S. 368, 66 L. Ed. 2d 577, 101 S. Ct. 669 (1981), it was well settled that orders granting disqualification are appealable. See Appendix D. Adhering to its commitment to the doctrine of judicial restraint, this Court beclouded the issue somewhat in its famous *Firestone* footnote number 8:

> The Court of Appeals also stated that orders granting motions to disqualify counsel would be appealable under §1291. 612 F. 2d, at 378. *That question is not presented by the instant petition, and we express no opinion on it.* . . (emphasis supplied)

The case at bar presents to this Court the opportunity to lift the cloud which its footnoted reservation placed over the issue of appealability of orders granting disqualification. It had seemed plain that such orders meet the requirements of the *Cohen* doctrine. However, a pronouncement of this Court to that effect is now more than ever needed, because of the footnoted caveat in *Firestone*.[5]

B. *The Cohen Criteria Are Satisfied*

In *Firestone*, this Court articulated the criteria which must be met for an order of the district court to be appealable immediately under 28 U.S.C. §1291 without awaiting resolution of the entire case. Speaking of the collateral order doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 93 L. Ed. 1528, 69 S. Ct. 1221 (1949), this Court said:

> We held that the Court of Appeals properly assumed jurisdiction of the appeal pursuant to §1291 because the District Court's order constituted a final determination of a claim "separable from, and collateral to," the merits of the main proceeding, because it was "too important to be denied review," and because it was "too independent of the cause itself to require that

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[5]Of course, depending upon this Court's view of its holding in *Firestone*, it may not even be necessary to accept certiorari to reinstate counsel. Thus, if, in holding denials of disqualification unappealable in the ordinary course in the sense that there should be no review (used broadly) of a denial, absent exigent circumstances to be demonstrated in an interlocutory appeal [28 U.S.C. 1292 (b)] or mandamus petition (28 U.S.C. 1651), then this Court could dispose of the matter by holding that, under such circumstances, the Court of Appeals should not have heard the matter en banc, and by vacating its decision and reinstating that of the panel. In this context, a petition for rehearing en banc would be viewed as an appeal. See *Western Pacific Railroad Corp.* v. *Western Pacific Railroad Co.*, 345 U.S. 247, 258, 259, 97 L. Ed. 986, 73 S. Ct. 656 (1953).

> appellate consideration be deferred until the whole case is adjudicated." *Id.* at 546. *Cohen* did not establish new law; rather it continued a tradition of giving §1291 a "practical rather than a technical contruction." [Citations omitted.] We have recently defined this limited class of final "collateral orders" in these terms: "[T]he order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of an action, and be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand* v. *Livesay, supra,* [439 U.S. 463, 468, 57 L. Ed. 2d 351, 98 S. Ct. 2454 (1978)], at 468 (footnote omitted). See *Abney* v. *United States,* 431 U.S. 651, 658, 52 L. Ed. 2d 651, 97 S. Ct. 2034 (1977).

Firestone v. *Risjord,* 449 U.S. at 374, 375.

Clearly, an order granting disqualification meets the first test, with even more reason then the denial of disqualification which was held to be a final determination in *Firestone*. 449 U.S. at 375. While Chief Justice Berger and Justice Rehnquist would not have held a denial of disqualification final because it was always subject to reconsideration in the district court,[6] the same cannot be said of an order *granting* disqualification. Looking at "practical" effects, the granting of disqualification certainly achieves with finality all of the harms to be avoided by an erroneous order. The granting of disqualification irretrievably

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[6] Looking at "practicality", who is to seek reconsideration of a disqualification -- the client pro se; the 'new' attorney who would be cast in the position of arguing that another (disqualified) attorney was somehow better or more competent or more needed that he, assuming the client can afford a 'new' attorney; the disqualified attorney who may no longer practice in the case. Obviously, the disqualified attorney is the proper party to seek reconsideration or appeal, notwithstanding the disadvantages under which he labors.

rends apart the attorney-client relationship, a relationship historically accorded significant protection and even indulgence in this country. It sullies without recourse the reputations of an attorney who assertedly "switched sides" and the firm which hired him, if the order is not appealable. It leaves the client bereft of his highly competent and specialized counsel of choice in an age where specialization and competence are much sought by both clients and the judiciary. It leaves the client presumptively prejudiced in each case, a prejudice which is manifest on the record of this case, where, upon a new trial, clients recovered barely one half as much damages as when they were represented by disqualified counsel. Disqualification here also undoes all the salutary effects of the government's waiver program, which enables it to attract hopefully the finest of young legal talent through allaying their justified concerns at job mobility. These concerns affect not only all young government attorneys but law clerks in both the judicial and, before graduation in the executive branches. Finally, the injury to the public perception of justice is complete when corporate defendants with billions of dollars in assets can win such a campaign of dubious "tactics" against those inncocent and unfortunate victims, the asbestos plaintiffs, whose health and very lives have once already been sacrificed on the altar of Mammon. Such evils call aloud for immediate correction and remedy. Plainly, by any "practical" analysis, an order granting disqualification is a final determination.

The second criterion actually involves two tests: first, that there be an important issue, and second, that the issue be completely separate from the merits of the action. This Court assumed this criterion was met in *Firestone*. 449 U.S. at 376. Separability has traditionally been judged from the

perspective of whether the issue involved is "enmeshed in the factual and legal issues comprising the cause of action." *Coopers*, 437 U.S. at 469. Here, the disqualification had nothing to do with either the facts or the theories upon which the underlying negligence/product liability cause of action was based. Plainly, disqualification here involved an issue wholly separate from the merits.

The importance of the issue is manifest:

1. The importance attached to what a former government attorney can and cannot do in private practice as reflected by congressional enactment in 18 U.S.C. §§207, 208, and Executive regulation in 28 C.F.R. 45.

2. The importance which the American Bar Association attached to the interpretation of its own Code of Professional Responsibility in its Formal Opinion 342 and to a proposed revision of that Code (Kutak Commission Report, Section 1.11) to amend the applicable provisions to prevent prophylactic disqualifications, as here, without any evidence of wrongdoing or showing of taint to judicial proceedings.

3. The fact that all courts considering the matter have permitted immediate appeals to prevent the type of abuse which occurred here.[7]

4. The fact that the government, unrepresented here, but a participant in the underlying litigation has a significant interest expressed both by itself to this Court[8] and by several former high ranking Department of Justice officials,

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[7]This Court was presumably influenced to some extent by the fact that six of eleven circuits did not allow appeals of denials of disqualification, three of those circuits having recently reversed prior decisions permitting appeals. *Firestone*, 449 U.S. at 373, n. 10 and associated text.

[8]The Department of Justice has followed the waiver approach recommended by the ABA. When it appears that a former Department attorney is adequately screened from participation in a case and will not share in fees attributable to it, and if there is no other significant appearance of impropriety in the particular instance, the Department has consented to the former Department attorney's law firm's participation in the case.

Brief of the United States in opposition [to Petition for Certiorari], *Kitchin* v. *United States*, Oct. Term, 1978, No. 78-1923, p. 8.

in the integrity and viability of its waiver process.[9]

5. The importance, absent supervening reason, attached to a litigant's right to be represented by competent counsel of his choice.

6. The frequency with which, in the absence of meaningful standards, the courts of appeals have to address one phase or another of ethical problems with widely discrepant results.

7. The importance of the public's view of a judicial system's processes which permits the Code of Professional Responsibility to be a plaything in a game of tactics without effective timely review.

It cannot be gainsaid that this issue is important, indeed, that it is crucial to the lifeblood of the legal profession and to the public's perception of it and the judicial system.

The third criterion, that the order be "effectively unreviewable", is also met here. It is significant that the denial of disqualification which was held not to comport with the criterion in *Firestone* was a showing based upon conjecture, supposition and "possibility", not one which would "supply a single concrete example of the indelible stamp or taint" to the judicial proceedings involved. 449 U.S. at 376.

On the other hand, the unavoidable harm of a grant of disqualification is vitally present, immediate and, in large part, irreparable if it is not reviewable without delay. As the Second Circuit succinctly said in distinguishing from denials

[9]See *Armstrong* v. *McAlpin*, 625 F.2d 433 (2d Cir. 1980), wherein on consideration en banc, former Solicitor General Erwin N. Griswold and twenty-four (24) former Attorneys General, Legal Counsel, Assistant Attorneys General, United States Attorneys and others filed a brief as amici curiae in support of screening mechanisms and the waiver process.

of disqualification:

> We do not reach the same conclusion, however, with respect to orders granting disqualification motions. In such cases, the losing party is immediately separated from counsel of his choice. If the order is erroneous, correcting it by an appeal at the end of the case might well require a party to show that he lost the case because he was improperly forced to change counsel. This would appear to be an almost insurmountable burden. In addition, permitting an immediate appeal from the grant of a disqualification motion does not disrupt the litigation, since the trial must be stayed in any case while new counsel is obtained. Moreover, the grant of a disqualification motion may effectively terminate the litigation if the party whose counsel is disqualified cannot afford to hire new counsel to begin the litigation anew. Such considerations are obviously pertinent, for example, in this case. See notes 2-3 and accompanying text, *supra*. Furthermore, the granting of a disqualification motion will raise a substantial question. Thus, it is far less likely that appeals from orders granting disqualifications motions will be taken purely for tactical reasons. Finally, disqualification often impairs the reputation of the disqualified firm or attorney, as this injury may never be corrected on appeal if the party is satisfied with the performance of his new counsel. For all these reasons, we now agree with then Chief Justice Clark's view, expressed well before *Silver Chrysler*, [496 F. 2d

800 (2d Cir. 1974)], that grants of disqualification motions are more important and potentially more harmful than denials of such motions and should therefore be immediately appealable as a matter of right. See *Fleischer* v. *Phillips*, *supra*, 264 F. 2d 515, 517 (2d Cir. 1959), cert. denied, 359 U.S. 1002, 3 L. Ed. 2d 1030, 79 S. Ct. 1139 (1959).

Armstrong v. *McAlpin*, 625 F.2d, at 440-441. Accord: *Duncan* v. *Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 646 F.2d, 1020, 1027 (5th Cir. 1981).

In addition, there is here an interest beyond that specifically addressed in the cited portion of *Armstrong* or in *Duncan* -- that of the United States. We address the merits as to that interest below (See Section III), but here note that the United States will have *no* means to remedy the decision below or to uphold its fully informed waiver processes and decision, since it has no entitlement whatsoever to appeal a judgment in a case between a plaintiff, whose counsel has been disqualified after receiving a waiver from the Department of Justice, and an asbestos manufacturer. This is especially serious because this is the first instance where one of its waivers has been rejected by a court.

Thus, the United States', the clients' and the attorneys' interests are all irretrievably prejudiced if the granting of a disqualification order is not immediately appealable.

II

A NON-CLIENT OF A FORMER GOVERNMENT ATTORNEY LACKS STANDING TO MOVE FOR DISQUALIFICATION OF A FIRM HIRING THAT ATTORNEY WHEN THE GOVERNMENT HAS GRANTED A WAIVER

The Motion to Disqualify Greitzer & Locks, as filed in the U.S. District Court to begin these proceedings, states

the following:

> This motion is brought on the grounds that participation by Mr. Peterson and Greitzer & Locks constitutes a direct violation of the Code of Professional Responsibility of the American Bar Association Canons 4, 5 and 9, Disciplinary Rules 9-101(B) and 5-105(D). . ."[10]

This naked allegation of the Motion, no facts having been pleaded, must be examined, for purposes of determining standing, in the light of the separate thrust of each of said Canons. Mr. Peterson's disqualification is, and always has been, fully conceded. For standing to plead and maintain an action for the disqualification of Peterson's employer, Greitzer & Locks, movants must be able to plead facts which, either by themselves or aided by presumptions of law, would show a violation of one of said Canons and the related disciplinary rule. As will follow, the movants utterly fail to do so.

The functions of Canons 4, 5 and 9 were carefully reviewed in *Fred Weber, Inc.* v. *Shell Oil Company*, 566 F.2d 602 (8th Cir. 1977), cert. den. 436 U.S. 905 (1978). Canon 4, said that Court, is limited by its language to the duty of the lawyer to his client. "Thus. . .one who seeks to employ Canon 4 to disqualify opposing counsel must show that counsel to have, or to have had, an attorney-client relationship with an adverse party in the present suit." While arguably applicable to Peterson, this Canon can in no way be directly invoked by the movants as to Greitzer & Locks. *Fred Weber* expressly rejects standing based on such relationships. Canon 4

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[10]Appendix E at A-106, A-107

protects the former client against the revelation of confidences, and can only be invoked by the former client or for his benefit. Certainly, it is absurd to permit these movants to invoke Canon 4 for the benefit of a client, the United States, which (i) has denied the existence of any confidences, (ii) has waived imputed disqualification, and (iii) has argued, in briefs to the Courts below, against imputed disqualification of Greitzer & Locks.

Canon 5, says *Fred Weber*, deals with professional zeal and precludes simultaneous representation of conflicting interests. Canon 5 guarantees to the client in pending litigation that his attorney's commitment of total loyalty and unfettered support and independent judgment will not be impaired by loyalty to past clients or other litigants. Nothing in the case at bar can be pleaded or proven to attach to Greitzer & Locks any of the impediments to which Canon 5 is directed. Only the asbestos plaintiffs, the clients now unhappily deprived of their services, have any standing to complain of a Canon 5 violation. Far from complaining of a violation, these plaintiffs by affidavits of those faced with early trial,* and by affidavits, briefs and testimony of the disadvantaged local counsel, have sought judicial relief from the prejudice and loss of lead counsel at a crucial and late stage in the litigation. . .a prejudice so obvious that an alert court might readily take judicial notice thereof.

It is acknowledged that DR 5-105(D), while originally confined to Canon 5 violations, could relate to a violation of other canons as well. As demonstrated above, it will not be applicable in this case, however, unless it requires imputed disqualification of Greitzer & Locks for a violation of DR 9-101(B). Under the general commandment of DR 9-101 to avoid "even the appearance of impropriety", Section B

*See App. K at A-144 et seq.

provides:

> A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee.

Taken at face value, and noting the conceded disqualification of Neil Peterson in the Virginia asbestos cases, DR 5-105(D) would appear to disqualify his new employer, Greitzer & Locks. However, it is crystal clear that the American Bar Association, in the interpretation and enforcement of the Canons, intends no such automatic result. ABA Formal Opinion 342* deals clearly and comprehensively with this subject, and expressly negates such a result for former government lawyers, where a screen is put in place. While not required, the express approval of Peterson's former government employer is plainly the most reliable criterion and should normally be controlling as to the efficacy of the screen. Here, the absence of a viable screen was never pleaded or proved, and while the government's formal waiver was admittedly not yet available and still being formulated when the motion was filed, the absence of a formal waiver was not pleaded or suggested in the Motion or in the deficient affidavit later filed in support thereof and ultimately withdrawn. Indeed, the record shows that, prior to filing their motion, the movants never made even the slightest inquiry of Greitzer & Locks, Neil Peterson or the Justice Department as to their concerns, nor did they give any prior hint of the Motion. Hence, neither the allegations of the movants nor any facts give the requisite standing to assert a violation of DR 9-101(B), or even state a justiciable claim.

*Appendix O at A-168 et seq.

III

THIS COURT SHOULD APPROVE AS A MATTER OF FIRST IMPRESSION THE USE OF "SCREENING" AS PRESCRIBED IN ABA FORMAL OPINION 342*

The District Court's rejection of a government approved screen set up by a former government attorney's law firm is in direct conflict with every other court that has reviewed such a screen. In *Kesselhaut* v. *United States*, 555 F. 2d 791 (Ct. Cl. 1977), the Court of Claims, sitting en banc, specifically sanctioned a screen set up by a private law firm to screen a former government attorney from participation in litigation against his former client, the United States government, in spite of the government's objection. See *Sierra Vista Hospital, Inc., et al.* v. *The United States*, 639 F. 2d 749 (Ct. Cl. 1981) wherein a Court of Claims panel affirmed a decision denying disqualification of three former government attorneys who were screened from other lawyers in their firm. Screening of a former Securities and Exchange attorney was also approved by the District Court in *Armstrong* v. *McAlpin*, 625 F.2d at 445, and by the District Court for the District of Columbia in *United States of America* v. *McDonnell Douglas Corporation, et al.* Criminal No. 79-516 (D.C. D.C. 1980) at 7. Moreover, an Illinois Circuit Court, considering a pro hac vice motion to admit Gene Locks in certain asbestos cases, was opposed by some of the same manufacturers as are Petitioners herein and considered nearly identical issues. The Court found no impropriety in allowing Locks to participate. App. G at A-110 et seq. We are aware of no court, other than the District Court below, which has overridden a government approved waiver. In fact, the more likely situation involves a court's supervisory review when the government refuses a waiver and unfairly constrains an attorney's right to practice. See *Kesselhaut, supra.*

*Appendix G.

The ABA Code of Professional Responsibility provides a mechanism whereby an attorney may appear against a former client,[10] after full disclosure, with the consent of all parties. DR 5-105(A). Such a consent, impliedly recognized in *Firestone*, is essentially a recognition that the former client is by far the most reliable judge of its own best interests. Where the former client accepts a screen and, after full consideration, waives imputed disqualification, who should be heard to complain? Only the new client, and certainly *not* a third party adversary whose interests are thoroughly inimical to both the old *and* new client.

ABA Formal Opinion 342 was adopted to avoid the unequal harshness DR 9-101(B) holds for government attorneys, by providing for a screening mechanism to prevent a former government attorney from sharing the secrets and confidence of the former client, the United States. A screen, coupled with a government waiver of imputed disqualification of the former government attorney's law firm is nothing more than the government's "consent". If screening were not available, an attorney, leaving the government's service, would "[a]utomatically infect all members of any firm he joined with his own personal disqualification, he would take on the status of a Typhoid Mary, and be reduced to sole practice under the most unfavorable conditions." *Kesselhaut*, 555 F.2d at 793.

The conduct of former government attorneys is regulated comprehensively by 18 U.S.C. § § 207-208 and the Code of Professional Responsibility. Petitioners are not asking this Court to formulate standards of conduct, but consistent with those rules of conduct, to approve

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[10] Rule 1.11(c) of the ABA Proposed Final Draft of its *Model Rules of Professional Conduct* provides for a screen to prevent the imputed disqualification of a former government attorney's law firm.

reasonable mechanisms to protect the United States and afford former government attorneys and their prospective employers the latitude necessary to make their skills marketable.

As noted in the United States' Amicus Brief, filed with the Appeals Court, the government has adopted a policy of granting waivers in appropriate circumstance. See excerpt from Brief of United States as Amicus Curiae, *Greitzer & Locks* v. *Johns-Manville, et al.*, No. 81-1379 (App. M at A-150 et seq.) Petitioners submit that the standards established in ABA F.O. 342 and employed by the government are more than adequate, if followed, to prevent taint to the trial proceedings.

Even the District Court recognized the standards and found that a screen was established whereby Peterson:

1. Could not directly work on the Norfolk cases.
2. Could not advise them on any matters concerning those cases.
3. Could not participate indirectly in those cases, by way of legal analysis, taking or preparing for any discovery, advice or in any other way whatsoever.
4. Could not be given access to any of the files.
5. Could not share in any monies derived from those cases. App. C at A-60, A-61.

Despite the absence of any evidence or any witness to testify to a breach of the screen, the District Court rejected the principle of screening, contrary to all established authority.

While Petitioners would not purport to set forth fully the government's interest, we respectfully suggest to the Court that it would be appropriate for its consideration of approving screening mechanisms to solicit the views of the United States in relation to this Petition for Certiorari.

IV

THIS COURT SHOULD EXERCISE ITS SUPERVISORY POWER OVER THE LOWER COURTS TO ARTICULATE STANDARDS FOR THE IMPUTED DISQUALIFICATION OF A FORMER GOVERNMENT ATTORNEY'S LAW FIRM

It is undisputed that:

1. Neil Peterson possessed no confidences of his former client, the United States Navy, in the Tidewater litigation. (See App. H at A-131 et seq. and App. I at A-136 et seq.) The Navy so states by letter.

2. A screen acceptable to and specially approved by the government was established by Peterson's law firm and never violated. (See App. J at A-138 et seq. and App. L at A-148 et seq.)

3. The government granted a waiver of *any* disqualification to the firm of Greitzer & Locks in the Tidewater litigation. (See App. J at A-148 et seq.)

4. There is no evidence or any concrete example of an indelible stamp or taint emanating from "[t]he fruits of a breach of confidence or by acts or omissions prompted by a divided loyalty." *Firestone* v. *Risjord*, 449 U.S. at 376.

Despite these uncontroverted facts, the District Court, (affirmed by an evenly divided Circuit Court, sitting en banc, and vacating its panel's decision) disqualified a law firm because it hired a former government attorney---an attorney whose former client, the United States, had waived the law firm's imputed disqualification pursuant to a procedure outlined and approved by the American Bar Association. The Court's holding, a bold example of the discredited prophylactic application of the American Bar Association's rules, is based upon mere speculation and hypothesis. The manufacturers presented no evidence to the court of any

breach of the screen. Nevertheless the court rejected the screen on the basis of unsupported conjecture:

> [I]t is unclear how disclosures, even inadvertant, can be prevented given the size of the firm and the prolonged nature of the litigation. Because of the magnitude of the litigation, there is the continuing risk that the agreement not to talk with Peterson about the cases or speak near Peterson about the cases will not be effective given the close, informal relationship which exists among law partners and associates. . . . App. C at A-83, A-84.

The District Court conveniently ignores the remarkable fact that the cases and files from which Peterson is screened are in eastern Virginia, and Peterson will be living and working in Philadelphia.

This Court, in *Firestone* v. *Risjord*, 449 U.S. at 376, implied that a showing of the "possibility" of taint in the trial proceedings is insufficient for disqualification. See also *Armstrong* v. *McAlpin*, at 445, 446. The movants have failed to show any concrete evidence of taint. Under these circumstances, the "appearance of impropriety is simply too slender a reed on which to rest a disqualification order. . particularly...where...the appearance of impropriety is not very clear." *Id.* at 445; *Board of Education of New York City* v. *Nyquist*, 590 F.2d 1241, 1247 (2d Cir. 1979).

In the face of increasing numbers of disqualification motions, often brought for tactical purposes, Petitioners submit that this Court should fashion guidelines for the lower courts to protect the interests of the clients involved, the attorneys, the public and the government, where appropriate. Their interests will be best satisfied by giving

them precedence where there is only a possibility of an appearance of impropriety unsupported by any evidence of taint in the proceedings. "Rather than heightening public skepticism we believe [this] restrained approach...." adopted by other courts"....towards attempts to disqualify opposing counsel on ethical grounds avoids unnecessary and unseemly delay and reinforces public confidences in the fairness of the judicial process." *Armstrong* v. *McAlpin*, 625 F.2d at 446. This Court [c]annot permit Canon 9 to be manipulated for strategic advantage on the account of impropriety which exists only in the minds of imaginative lawyers. *Woods* v. *Covington*, 537 F.2d 804, 819 (5th Cir. 1976).

The issue in this case is not whether one attorney is presumed to have confidences of a former client which he is presumed to transfer to a new client, but whether a non-client can raise a valid evidentiary claim of taint in the proceedings. It is inappropriate for the Court to deal with inferences and speculation. The basic question involved here is whether an attorney can exercise independent judgment and whether he *has* exposed confidences. Absent evidence of affirmative wrongdoing, an "appearance of impropriety" is not sufficient for disqualification.

If a violation of the Code of Professional Responsibility occurs during litigation, the courts, with the resources available and the "comprehensive disciplinary machinery" of the state and federal bar, should be able to deal with it. See *Armstrong*, 665 F.2d at 446 and *Nyquist*, 596 F.2d at 1246.

Standards are required to prevent a phophylactic approach. Imputed disqualification proceedings should never presume a violation, and may not be conducted in the spirit of a show cause hearing, such as took place in the District Court, which admitted to strong feelings by acknowledging:

> If the Court had been consulted prior to the

employment (of Neil Peterson), the Court would have reached the same conclusion...(App. C at A-96).

It is apparent from the District Court's opinion, as well as the proceedings which it conducted, that it required no evidence to satisfy the manufacturers' burden of proof to demonstrate prejudice; rather it placed the burden upon Greitzer & Locks to show why the firm should not be disqualified, a burden which, by using factually unfounded adverse inferences and speculation, it made impossible to satisfy.

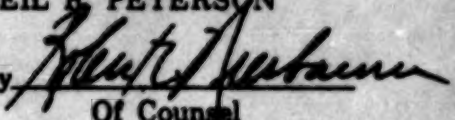
Given the undisputed facts that a government approved screen was established, that there was no evidence of a breach of the screen and the only reasoning of the Court developed for Petitioners' disqualification was based upon speculation, the case virtually screams out for this Court to exercise it supervisory powers to articulate a standard for disqualification of a former government attorney's law firm. This Court should enunciate such a standard by sanctioning the rules and opinions set forth by the American Bar Association and the Kutak Commission. Not to do so at this time will not only countenance, but will even encourage, the evils inflicted below upon 260 litigants and their youthful local counsel. That their legitimate interests were virtually ignored by the Dictrict Court is readily discernable from its opinion, and starkly clear from the record.

CONCLUSION

This case offers an up-to-date illustration of the classic use of law to obstruct justice. By merely filing their motion in November, 1980, and letting the matter take its course, the moving asbestos manufacturers have kept all but four cases of 260 plaintiffs from coming to trial. $25,000,000.00 of liability, conservatively estimated, was thereby postponed at least two years during a period when effective interest rates averaged fifteen percent (15%) or higher. It is informative that the chief movant, Johns-Manville Company, never opposed any stay sought by the plaintiffs pending the determination of these disqualification proceedings. With time running out at the bar of justice, Johns-Manville has now invoked the Bankruptcy Act and turned to Congress for relief from its own misdeeds. It is respectfully urged that this Court, as the ultimate Court of Justice, put the state of the law of disqualification into a set of rules which, while protecting the integrity of the judicial system, will not permit the system to be subverted in the deplorable fashion illustrated here. In retrospect, it is reasonably clear that the asbestos manufacturers put out the bait, and the District Court swallowed it, hook, line and sinker. Only this Court can undo the mischief in the pending case, and prevent the deluge which will inevitably follow if the District Court is not reversed. It is necessary that the real malefactor be identified; not the government lawyer with seventeen (17) years of honorable service; not the beleaguered law firm which innocently employed him to try non-Virginia cases,

and not 260 injured Virginia asbestos plaintiffs who could not possibly benefit from Peterson's employment. Otherwise apres nous, le deluge!

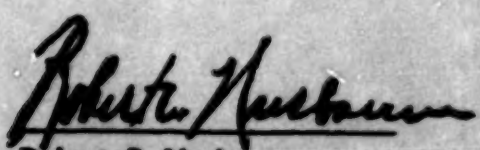
Respectfully Submitted,
GREITZER & LOCKS,
GENE LOCKS and
MARTIN GREITZER;
NEIL B. PETERSON

By 
Of Counsel

Robert C. Nusbaum
Linda S. Laibstain
HOFHEIMER, NUSBAUM, McPHAUL & BRENNER
1010 Plaza One
Norfolk, Virginia 23514
804-622-3366

CERTIFICATE

I hereby certify that I have served three copies of the foregoing Petition for a Writ of Certiorari to all counsel of record this 15th day of September, 1982.


Robert C. Nusbaum
Counsel for Petitioners